The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

HIGH MAINTENANCE BITCH, LLC, a Washington LLC,

Plaintiff,

v.

UPTOWN DOG CLUB, INC., a Texas Corporation

Defendants.

Civil Action No. C07-0888-RSL

DEFENDANT'S MOTION AND MEMORANDUM TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO CIVIL RULE 12(b)(2) AND IMPROPER VENUE, OR ALTERNATIVELY TO TRANSFER AND FOR PLAINTIFF TO PROVIDE A MORE DEFINITE STATEMENT

NOTE ON MOTION CALENDAR: AUGUST 17, 2007

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This case is best suited for a small claims court because the potential damages most likely will amount to less than a hundred dollars. Unfortunately for this Court, small claims courts do not have subject matter jurisdiction over patent cases and rather than attempt to avoid litigation by sending a simple letter explaining the situation, Plaintiff High Maintenance Bitch filed suit against Defendant Uptown Dog Club, Inc. ("Uptown Dog"), a home-based Texas company, for its involvement in the sale of undisclosed products that allegedly infringe one or more of High Maintenance Bitch's design patents.[1]

Because High Maintenance Bitch never communicated with Uptown Dog and the Complaint fails to identify any accused products, Uptown Dog is unclear on which items are actually accused of infringement. Uptown Dog attempted to gather such information from High Maintenance Bitch, but High Maintenance Bitch has refused to identify the allegedly infringing products.[2] More importantly, High Maintenance Bitch does not allege that Uptown Dog committed any specific acts in Washington, directed any specific acts towards Washington, or that Uptown Dog has any places of business or agents in Washington.[3] It appears that High Maintenance Bitch's assertion of personal jurisdiction over Uptown Dog is based on nothing more than the fact that High Maintenance Bitch itself is located here. But it is clear from the case law that this is not sufficient.

Given Uptown Dog's lack of contacts with Washington, the assertion of personal jurisdiction against Uptown Dog does not satisfy constitutionally guaranteed due-process

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[1] *See* the concurrently filed Declaration of Lisa Woody ("Woody Decl.") at ¶2.

[2] From newspaper articles, it appears that High Maintenance Bitch is alleging that Uptown Dog's sale of its feather boa is infringing its patents. *See* Dallas Business Journal, June 29, 2007, "Local Pet Supply Store Sues To Protect Feather Boa," attached as Exhibit 1 to the concurrently filed Declaration of Steven P. Fricke ("Fricke Decl."). Assuming that is correct, Uptown Dog delivered a total of 22 feather boa dog collars. The retail cost of the boa dog collars is between $12.49 and $16.99 depending on the size of the collar. In an abundance of caution, Uptown Dog has ceased selling these boa dog collars since the filing of this lawsuit. Woody Decl." at ¶19.

[3] *See generally,* Complaint.

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requirements. Accordingly, the Court should dismiss this suit with prejudice. Thus, in lieu of filing an answer to the Complaint, Uptown Dog seeks dismissal for lack of personal jurisdiction pursuant to CR 12(b)(2). Because no basis for personal jurisdiction over Uptown Dog has been established, Uptown Dog's appearance through counsel in this Court is solely to challenge jurisdiction and is not a consent to jurisdiction in this Court.

Alternatively, Uptown Dog requests that this case be transferred to Texas and that High Maintenance Bitch specifically identify the products that are actually accused of infringement to allow Uptown Dog to prepare its defense in this frivolous matter.

II. BACKGROUND

A. This Case Does Not Involve Activities Directed Towards Washington State.

1. High Maintenance Bitch is business with national aspirations.

Plaintiff High Maintenance Bitch is a Washington State limited liability company with its current principal place of business in Seattle, Washington.[4] According to its web site and news articles, High Maintenance Bitch sells high-end pet products. High Maintenance Bitch's goal is to keep people's pets looking as beautiful and confident as their owners[5] and to grow around the country over the next three years. High Maintenance Bitch decided to file this lawsuit and two similar lawsuits because High Maintenance Bitch's growth has given it the resources to do so.[6]

2. Uptown Dog has no contacts with Washington and is operated out of a Texas home.

Uptown Dog is a small-time seller of pet products. It is owned and operated by the mother/daughter team of Lisa Woody and Elaine Bennett. Uptown Dog operates from Ms. Bennett's Texas home and has two part-time employees, who also reside in Texas.

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[4] *See* Complaint 1.

[5] *See* High Maintenance Bitch web site, copy attached as Exhibit 2 to Fricke Decl..

[6] *See* Exhibit 1 to Fricke Decl.

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Uptown Dog does not manufacture any of its own products but only sells products supplied to it by other non-parties, which also do not reside in Washington.[7]

Uptown Dog has never had or designated an authorized agent or representative in Washington for service of process or otherwise. Uptown Dog has never owned, possessed, controlled, leased, maintained, or operated any office, residence or business of any kind in Washington. Uptown Dog has never maintained any bank or savings and loan accounts in Washington. Uptown Dog's representatives have never traveled to Washington. Uptown Dog has never directed advertising specifically toward residents or companies located in Washington, nor has it ever advertised in any publication directed primarily toward Washington. Uptown Dog does not pay taxes to the State of Washington, does not maintain any address or possess any real estate in Washington, does not maintain a telephone number in Washington, and does not manufacture a product in Washington.[8]

Simply put, Uptown Dog does not have any significant contacts with the State of Washington.

B. The Complaint is silent on facts regarding personal jurisdiction and which products are accused of infringement.

Until the filing of the lawsuit, Uptown Dog had no contact with High Maintenance Bitch and was caught completely off-guard by the filing of the Complaint, which is missing several key facts regarding personal jurisdiction.[9] Other than correctly alleging that Uptown Dog "is a corporation organized and existing under the laws of Texas, with its principal place of business at 9188 Chivalry Court, Frisco, Texas, 75034," the Complaint contains no further statement regarding Uptown Dog's location of business or activities that would give rise to personal jurisdiction.

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[7] Woody Decl. at ¶4.

[8] Woody Decl. at ¶¶5-11.

[9] Woody Decl. at ¶18.

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In attempt to resolve this matter, through their respective counsels, Uptown Dog contacted High Maintenance Bitch to inform them that Uptown Dog has not sold very many dog collars and, more importantly, to determine which products are accused of infringement. High Maintenance Bitch flatly refused to provide such basic information, stating that "[it does not] believe it is appropriate to provide [Uptown Dog] with model numbers or anything else" and that Uptown Dog will have to wait until discovery process to learn this most basic information.[10] Apparently this type of gamesmanship (*i.e.*, forcing defendants to guess which products are accused of infringement) is all part of High Maintenance Bitch's aggressive approach of prosecuting its cases against a home based Texas company that cannot afford to litigate this action in a distant forum.[11]

III. ARGUMENT

A. High Maintenance Bitch Bears the Burden of Proving Personal Jurisdiction

By filing a motion to dismiss pursuant to CR 12(b)(2), supported by sworn testimony, a defendant places the sufficiency of the plaintiff's pleading in question, and thus shifts to the plaintiff the burden of proving facts demonstrating the existence of personal jurisdiction.[12] But as discussed fully below, High Maintenance Bitch's Complaint fails on its face to assert any allegation that could serve as the basis for a Washington court's exercise of personal jurisdiction over Uptown Dog.

In fact, because it is void of any facts that can connect Uptown Dog and Washington, the Court has only one option: ***dismiss this case with prejudice***.[13]

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[10] *See* Exhibit 3 to the Fricke Decl. (email string between Steven P. Fricke and Danny Bronski).

[11] *See* Exhibit 1 to the Fricke Decl. ("We've decided to take a very aggressive approach to defending our intellectual property," said Lori Pacchiano).

[12] *Electronics For Imaging, Inc., v. Coyle*, 340 F.3d 1344, 1350 (Fed. Cir. 2003).

[13] *See Snyder v. Pinal*, C.A. No. 02-124-GMS (D. Del. 2002) (court dismissed plaintiff's case because the complaint did assert any connection between the defendant and the forum state) attached as Exhibit 4 to Fricke Decl.

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B. High Maintenance Bitch's Jurisdictional Claims Does Not Satisfy Either Washington's Long-Arm Statute or the United States Constitution

The determination of whether the Court can exercise personal jurisdiction over an out-of-forum party is controlled by a two-part inquiry: (1) whether jurisdiction is permitted by the forum state's long-arm statute; and (2) whether jurisdiction is consistent with the out-of-forum defendant's right to Constitutional Due Process.[14]

1. Washington's Long-Arm Statute Does Not Confer Personal Jurisdiction.

Here, the relevant portion of Washington's long-arm statute, identifying acts that may subject an out-of-forum defendant to jurisdiction, reads as follows:

> **4.28.185**. Personal service out of state--Acts submitting person to jurisdiction of courts--Saving
>
> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;
>
> . . . .[15]

Washington State's long-arm statute extends to limits of federal due process and is coextensive with outer limits of due process. Thus, in determining whether personal jurisdictions can be exercised over a nonresident defendant, the Court is required only to analyze whether such exercise would comport with due process.[16] Thus, in this case, the two step inquiry folds into one: whether exercise of personal jurisdiction as to Uptown Dog violates its Constitutional Due Process protections.

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[14] *International Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

[15] RCW § 4.28.185 (1996).

[16] *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1314, 514 U.S. 1004, 131 L.Ed.2d 196 (1995).

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2. Constitutional Due Process Prevents Personal Jurisdiction.

Federal Circuit law governs the personal jurisdiction analysis in patent cases.[17] There are two kinds of personal jurisdiction—specific and general. "Specific jurisdiction 'arises out of' or 'relates to' the cause of action even if those contacts are 'isolated and sporadic.' . . . General jurisdiction arises when a defendant maintains 'continuous and systematic' contacts with the forum state even when the cause of action has no relation to those contacts.".[18] Only when the requirements for general or specific jurisdiction are met, can a court exercise personal jurisdiction over an out-of-forum defendant.

a. General Jurisdiction does not exist over Uptown Dog.

While specific jurisdiction, discussed below, refers to jurisdiction over a cause of action arising from or relate to a defendant's contacts with the forum state, general jurisdiction refers to the ability of a court to maintain jurisdiction based on defendant's contacts that are unrelated to the cause of action. Because general jurisdiction is based upon "unrelated" activities, its subject to a more stringent minimum contacts test, requiring "substantial" or "continuous and systematic business contacts."[19]

High Maintenance Bitch does not assert general jurisdiction in this case. There are no allegation that Uptown Dog has continuous and systematic contacts with Washington, even if those contacts are not related to the cause of action.[20]

In any event, in examining the propriety of general jurisdiction, courts look for a direct permanent physical relation to the forum.[21] For example, courts often inquire into whether the

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[17] *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564-65 (Fed. Cir. 1994), *cert. dismissed*, 115 S. Ct. 118 (1994).

[18] *LSI Indus. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000) (*quoting*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)).

[19] *Helicopteros Nacionales de Colombia S.A.* 466 U.S. at 416.

[20] *See generally*, the Complaint.

[21] *Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1359 (Fed.Cir. 1998).

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defendant maintains offices, facilities, bank accounts, real estate, telephone numbers or postal addresses with the forum.[22] Here, Uptown Dog has no offices, facilities, bank accounts, real estate, telephone number or postal address in Washington.[23] Moreover, Uptown Dog does not any engage in any significant business in the state of Washington.[24] Thus, Uptown Dog has not maintained "substantial" or "continuous and systematic" business contacts with the State of Washington. Uptown Dog lacks the necessary contact with Washington to establish general jurisdiction.[25]

b. Specific Jurisdiction does not exist over Uptown Dog.

General jurisdiction aside, the Court must next examine whether there is specific jurisdiction over Uptown Dog. In determining whether Constitutional Due Process has been satisfied, the nonresident must have "minimum contacts" with the forum state "such that [it] should reasonably anticipate being hauled into court there."[26] Whether minimum contacts with the forum exist is determined by examining whether the defendant has "purposefully availed" itself of the privilege of conducting activities within the forum, "thus invoking the benefits and protections of its laws."[27] The "purposeful availment" requirement is not satisfied by allegation of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another person."[28] Rather, a court can exercise "specific jurisdiction" over a

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[22] *Id.* ; *see also Oacis Health Care Sys., Inc. v. Allcare Health Mgmt. Sys.*, 2000 U.S. Dist. Lexis 5902 (N.D. Cal. April 28, 2000).

[23] Woody Decl. at ¶7.

[24] Woody Decl. at ¶¶5-11.

[25] *See Helicopteros Nacionales de Colombia S.A.*, 466 U.S. at 410-11 (denying general jurisdiction ***despite*** sales negotiations, purchasing of equipment, and training of personnel in the forum state); *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F.Supp.2d 907 (D.Or. 1999); *Boppy Co. v. Luvee Products Corp.*, 72 USPQ2d 1577 (D. Colo. 2004) (interactive web site alone is not enough to confer jurisdiction).

[26] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980).

[27] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)

[28] *Burger King Corp.*, 471 U.S. at 475 and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)

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defendant only when the factual basis for the complaint "arises out of or relates to the forum" and "creates as substantial connection with the forum."[29]

Even where the plaintiff demonstrates that a defendant possesses the required minimum contacts with the forum, Constitutional Due Process requires the plaintiff to demonstrate that the exercise of jurisdiction over the defendant does not offend "traditional notions of fair play and substantial justice."[30]

The Federal Circuit has outlined a three-prong test for determining if specific jurisdiction exists whether:

(1) the defendant purposefully directed its activities at the residents of the forum;

(2) the claim arises out of or is related to those activities; and

(3) assertion of personal jurisdiction is reasonable and fair.[31]

C. Uptown Dog Has Not Purposefully Directed Activities at the State of Washington

"To satisfy the first factor, the plaintiff must establish that the nonresident defendant 'purposefully availed itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws.' The focus of the inquiry is on the defendant's activities in the forum. The sufficiency of the contacts is determined by the quality and nature of the defendant's activities, not the number of acts or mechanical standards. A state does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the

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[29] *Red Wing Shoe Co.*, 148 F.3d at 1359 (*citing Burger King Corp.*, 471 U.S. 462 (1985)) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984).

[30] *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *World-Wide Volkswagen*, 444 U.S. at 292.

[31] *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1307-08 (Fed. Cir. 1999) (*citing Akro Corp. v. Luker*, 45 F.3d 1541, 1545-46 (Fed. Cir. 1995)); *Electronics For Imaging, Inc.*, 340 F.3d at 1350.

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most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved by considering the acts of the defendant."[32]

First, there is no basis for specific jurisdiction over Uptown Dog. Each of High Maintenance Bitch's alleged causes of action against Uptown Dog apparently arise out of Uptown Dog's sales of a third party's products because Uptown Dog does not manufacture its own products. Because High Maintenance Bitch refuses to identify which products are accused of infringement, it is unclear whether Uptown Dog has made any sales of any accused products in Washington.[33] Accordingly, High Maintenance Bitch's alleged injuries cannot be found to have arisen out of activities of Uptown Dog's "purposefully directed" toward Washington residents.

High Maintenance Bitch's assertion of personal jurisdiction over the defendant appears to result from its erroneous belief that Uptown Dog can be sued here simply because High Maintenance Bitch is located here. But it is not sufficient that High Maintenance Bitch is a Washington resident. High Maintenance Bitch's presence in Washington is a "mere fortuity" and the relation of Washington to the torts is too attenuated to support specific jurisdiction over the defendant.[34] Thus, High Maintenance Bitch has not satisfied its burden of showing

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[32] *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wash. App. 699, 710-11, 919 P.2d 1243 (1996)(*citations omitted*); *see also, Deprenyl Animal Health, Inc. v. University of Toronto*, 297 F.3d 1343, 1350 (Fed. Cir. 2002) (*quoting, Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1360 (Fed. Cir. 2001) and *Burger King Corp.*, 471 U.S. at 471-76) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984).

[33] *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F.Supp.2d 907, 921 (D.Or. 1999) (Court dismissed the action because the only contact with the forum state was an interactive website that did not specifically target Oregon residents) ; *Boppy Co. v. Luvee Products Corp.*, 72 USPQ2d 1577 (D.Colo. 2004) (interactive web site alone is not enough to confer jurisdiction) ; *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996) ("Creating a site … it is not an act purposefully directed toward the forum state"); *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 330 (D.S.C. 1999) (a web site alone is not enough to find jurisdiction because it "would eviscerate personal jurisdiction requirements as they currently exist.").

[34] *See Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985) (dismissing suit for lack of personal jurisdiction where the defendant's contact with forum state rested solely on "the mere fortuity of that the plaintiff happened to be a resident"); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 771-73 (5th Cir. 1988) (dismissing claim of tortious interference with contract and business relations for want of personal jurisdiction because no evidence that intentional actions were "expressly aimed" at forum state, or that actor knew brunt of

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that there are minimum contacts with Washington and that any of Uptown Dog's activity were purposefully directed at Washington.

D. High Maintenance Bitch's Claims Did Not Arise From Uptown Dog's Contacts With the State of Washington

Washington courts apply the "but for" test to determine whether a claim against a nonresident business arises from, or is connected with, its solicitation of business within the state. This factor is established if the events giving rise to the claim would not have occurred "but for" the businesses solicitation within this state.[35] The "but for" test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum. Again, it is the plaintiff's burden to establish this element.[36]

Because Uptown Dog did not conduct any business solicitations in Washington,[37] High Maintenance Bitch cannot meet its burden. As a result, this Court does not have personal jurisdiction over Uptown Dog and this case must be dismissed.

E. It Would Be Totally Unfair and Unreasonable to Exercise Personal Jurisdiction Over a Texas Corporation With No Business Activity Directed Towards Washington

Because High Maintenance Bitch cannot satisfy the "minimum contacts" prong of the due-process test, the Court need not consider the second prong of the test—the "fair play and substantial justice" prong.[38] Assuming, however, that a plaintiff does satisfy the first prong, then a court should determine whether it is unfair, under the circumstances, to force the defendant to litigate in the forum state.[39] Reasonableness is determined by balancing several

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injury would be felt by the state's resident). *See also, Burger King*, 471 U.S. at 475 and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996).

[35] *Raymond v. Robinson*, 104 Wash.App. 627, 640, 15 P.3d 697 (Wash.App. Div. 2, 2001) (*citing CTVC of Hawaii Co*., 82 Wash. App. at 719).

[36] *Id.*

[37] Woody Decl. at ¶10.

[38] *See Patterson*, 764 F.2d at 1148 n.5.

[39] *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987).

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factors, namely: "(1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the interest of the states in furthering their social policies."[40] Here, these factors show that subjecting Uptown Dog to personal jurisdiction in Washington would be unfair and unreasonable.

First, it would be extremely burdensome for Uptown Dog to litigate in Washington. Because Uptown Dog is a small Texas company, its only place of business is in Texas, the burden on Uptown Dog would be particularly severe.[41] Uptown Dog does not have the financial resources to litigate in a distant forum, especially when it does not know what products are accused of infringement and its gross sales for boa dog collars are less than $400.[42] All of Uptown Dog's personnel, documents, inventory, and facilities are located in Texas.[43] In addition, Ms. Bennett, the vice president of Uptown Dog, is 64 and uses a walker for mobility. As a result, it would be extremely burdensome for her to travel to Seattle or elsewhere in Washington to participate in any part of these proceedings.[44]

With respect to Uptown Dog's interest in trying this case close to home, that interest is more than offset by the overall inconvenience of this forum. None of the witnesses or records relating to the alleged activities that gave rise to the causes of action against High Maintenance Bitch are located in Washington. The alleged products were manufactured by a third party and sold and shipped to Uptown Dog in Texas.[45] Thus, Washington would not be a convenient forum for the resolution of this dispute.

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[40] *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 429 (Fed. Cir. 1996) (citing *World-Wide Volkswagen*, 444 U.S. at 292).

[41] *See Asahi*, 480 U.S. at 114.

[42] Woody Decl. at ¶19.

[43] Woody Decl. at ¶14.

[44] Woody Decl. at ¶12.

[45] Woody Decl. at ¶4.

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Finally, any interest this forum has in adjudicating this dispute is minimal since none of the Uptown Dog's alleged tortious acts took place in or were directed toward Washington, and any contacts the Uptown Dog has had with Washington are negligible.[46] The only connection this dispute has to Washington is the fact that High Maintenance Bitch is located here, and that simply is not enough to satisfy due process.[47]

The remaining three factors do not support personal jurisdiction over Uptown Dog because all federal courts can grant the same relief as this Court and there is nothing special in this case that weighs in favor of holding personal jurisdiction over Uptown Dog.

Moreover, High Maintenance Bitch is not utilizing this statute in a *bona fide* manner. It is attempting to utilize its resources to force a small Texas company from engaging in future competition and to outspend it in this litigation.[48] High Maintenance Bitch's manner in which it has conducted itself in attempting to extort its litigation power over Uptown Dog clearly demonstrates that it is using this statute for unlawful harassment or injury and as a means of overshadowing ends in scheme of litigation.[49] As a result, the Court does not have personal jurisdiction over Uptown Dog and the long-arm statute will not establish jurisdiction if none existed before the statute's enactment.[50]

IV. UPTOWN DOG SHOULD BE AWARDED ITS REASONABLE ATTORNEY FEES AND COSTS IN DEFENDING AGAINST THIS ACTION

Because High Maintenance Bitch cannot meet its burden and prove that this Court has personal jurisdiction over Uptown Dog, this Court should order High Maintenance Bitch to

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[46] Woody Decl. at ¶¶5-11.

[47] *See Crown Sterling, Inc. v. Clark*, 815 F. Supp. 199, 204 (N.D.Tex. 1993).

[48] See Exhibit 1 to Fricke Decl. ("The company decided to file the lawsuits now because its growth has given it the resources to do so.").

[49] *See Eon-Net, L.P. v. Flagstar Bancorp, Inc.* (C05-2129MJP) (W.D. Washington 2006).

[50] *See Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.*, 71 Wash. 2d 679, 430 P.2d 600 (1967).

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pay Uptown Dog its reasonable attorney fees and costs in defending against this suit in a forum some 2000 miles away from its principal place of business.[51]

The intent of the attorneys' fees provision of the long-arm statute, is to permit courts, in their discretion to award such fees as compensation for an out-of-state defendant having to defend against a frivolous action or one in which the burden upon such a defendant outweighs convenience to him and would otherwise offend traditional notions of fair play and substantial justice.[52]

As stated above, this action offends traditional notions of fair play and substantial justice and Uptown Dog should not be penalized for High Maintenance Bitch's bullying tactics.

V. THIS CASE SHOULD ALSO BE DISMISSED BECAUSE OF IMPROPER VENUE.

Venue in a patent action against a corporate defendant is governed by 28 U.S.C. §§ 1400(b) and 1391(c).[53] Having stated *supra* that Uptown Dog does not reside in Washington, does not have a place of business in Washington, and has not committed an act of infringement in Washington, and having demonstrated that this Court does not have personal jurisdiction over Uptown Dog, it follows that venue is not proper in this Court.[54]

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[51] *See* RCW § 4.28.185.

[52] *State v. O'Connell*, 84 Wash. 2d 602, 528 P.2d 988 (1974).

[53] *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990); 28 U.S.C. § 1400(b) provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. § 1391 (c) provides:

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. . . . .

[54] Likewise, under the same factual basis, venue would be improper under 28 U.S.C. § 1391(b) .

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VI. ALTERNATIVELY, THE COURT SHOULD TRANSFER THIS ACTION TO THE DISTRICT OF TEXAS

If the Court decides that personal jurisdiction does exist over Uptown Dog, then Uptown Dog request the Court transfer this action to the United States District Court, Northern District of Texas under 28 U.S.C. § 1404(a), which states: a district court may transfer a civil action "for the convenience of parties and witnesses [and] in the interest of justice . . . to any other district or division where it might have been brought."[55] "The district court has broad discretion to consider case-specific circumstances."[56]

District courts use a two-step analysis to determine whether a transfer is proper. Step one considers the threshold question of whether the case might have been brought in the forum to which the transfer is sought.[57] If it concludes that the venue is proper in the transferee court, the district court then balances the plaintiff's interest to freely choose a litigation forum against the aggregate considerations of convenience of the defendants and witnesses and the interest of justice.[58]

With respect to the issue of convenience, a district court must "weigh multiple factors in its determination whether transfer is appropriate in a particular case."[59] One important factor is the convenience of witnesses.[60] Indeed, as one district court observed, this factor is "often the most important factor."[61]

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[55] 28 U.S.C. § 1404(a); *Asymetrix Corp. v. Lex Computer & Mgt. Corp.*, 1995 WL 843059, *4 (W.D. Wash. 1995).

[56] *Asymetrix Corp.*, 1995 WL 843059, at *4.

[57] *Id; Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985).

[58] *Id*.

[59] *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000), *cert. denied*, 531 U.S. 928 (2000).

[60] *See id*. at 499 (holding where "more of the relevant witnesses" resided in plaintiff's chosen forum, district court properly weighed that factor in the transfer analysis).

[61] *See Steelcase Inc. v. Haworth Inc.*, 41 U.S.P.Q.2d 1468, 1470 (C.D.Cal. 1996).

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Several other factors inform the element of convenience, including: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for unwilling witnesses and the cost of securing willing witnesses; (3) the practical problems that make a case easier or more difficult to try in a given forum; (4) the administrative difficulties flowing from court congestion; and (5) the local interest in the issue.[62]

B. This Action Might Have Been Brought in the N.D. of Texas.

Here, the action "might have been brought" in the Northern District of Texas, because Uptown Dog resides in Texas.[63] Thus, the Court can utilize its discretion in transferring this matter to the United States District Court, Northern District of Texas.

C. Plaintiff's Choice of Forum Is a Non-Factor in this Case

"[D]istrict courts have applied a 'general rule' that, in actions based on a claim of patent infringement, a plaintiff's choice of forum is accorded little deference where the central facts of the lawsuit occur outside the plaintiff's chosen forum."[64] "In such circumstances, 'the preferred forum is that which is the center of the accused activity.'"[65] "The 'center of the accused activity' is the forum where the defendant is alleged to have developed, tested, researched, produced, marketed, and made sales decisions concerning the accused product."[66]

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[62] The Ninth Circuit identified eight additional factors that a district court should consider: "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *See Jones,* 211 F.3d at 498-99.

[63] *See* 28 U.S.C. § 1400(b) (providing action for patent infringement may be brought in district where defendant resides).

[64] *Sorensen v. Daimler Chrysler AG*, 2003 WL 1888866, *3 (N.D.Cal. 2003) (*citing S.C. Johnson & Son, Inc. v. Gillette Co.*, 571 F. Supp. 1185, 1187-88 (N.D.Ill. 1983)).

[65] *Id.*

[66] *Id.* ; *see also S.C. Johnson & Son,* 571 F. Supp. at 1188 (holding preferred forum was district in which defendant conducted "all development, testing, research, and production" and made "virtually all marketing and sales decisions" concerning accused product); *Saint-Gobain Calmar, Inc. v. Nat'l Products Corp.*, 230 F. Supp. 2d 655, 660 (E.D.Pa. 2002) (holding plaintiff's choice of forum entitled to less deference where "center of gravity of the alleged infringement" occurred in another forum where defendant assembled and shipped accused device).

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In *Sorensen*, the court held that the center of the accused activity was Germany, where all design and manufacturing decisions were made, or New Jersey, where all marketing and sales decisions were made.[67]

The "center of gravity" of the alleged infringement is in Texas, home of Uptown Dog's sole facility and headquarters, and the location from which Uptown Dog's products are marketed, and where sales decisions are made.[68] According to the Complaint, this forum, on the other hand, has no relation to this case. No significant activity relative to this case has occurred in this forum. Consequently, High Maintenance Bitch's choice of the Western District of Washington is entitled to little, if any, deference.

C. The Balance of Conveniences Overwhelmingly Favors Uptown Dog

1. Convenience of the Witnesses

The convenience of the overwhelmingly witnesses favors the Northern District of Texas. The persons involved in the marketing of the Uptown Dog's products are in Texas. Specifically, Lisa Woody and Elaine Bennett, the co-founders of Uptown Dog, are most familiar with the marketing of the Uptown Dog's products.[69]

Traveling to Washington will also cause a physical hardship to Ms. Bennett. Ms. Bennett is 64 years of age and utilizes a walker to assist her with her mobility.[70] Once again, this factor weighs in favoring transferring this matter to the Texas.

2. The Relative Ease of Access to Sources of Proof Favors the N.D. of Texas.

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67 *See Sorensen*, 2003 WL 1888866, at *3; *see also L.G. Electronics Inc. v. First In'l Computer, Inc.*, 138 F.Supp. 2d 574, 590 (D.N.J. 2001) (holding "center of gravity of the allegedly infringing activity" in Taiwan or California where one defendant manufactured accused device in Taiwan and second defendant make marketing and sales decisions in California).

68 Woody Decl. at ¶¶5-14.

69 Woody Decl. at ¶¶2-3.

70 Woody Decl. at ¶15.

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Just as the key witnesses in this case are located in Texas, so are all of Uptown Dog's records.[71] As a result, this factor weighs in favor of transfer.

3. The Local Interest in the Case and Contacts to the Forum

The Ninth Circuit also directs the district courts to consider "the local interest in the issue" in deciding whether to transfer a case,[72] and "the contacts relating to the plaintiff's cause of action and the chosen forum."[73] In the instant case, there is no specific Washington local interest in the case or any issue in it have been alleged in the Complaint. Yet, because the center of activity being in Texas, this factor weighs in favor of transfer to the Northern District of Texas. As one court in this Circuit stated in transferring a case:

> As to contacts relating to the plaintiff's cause of action, both parties' contacts with the Northern District appear to relate to the instant claims only to the extent that infringing products may have been sold in the Northern District. Those contacts, however, are likely to exist in every district in the United States, including the District of New Jersey. By contrast, as discussed above, one of the centers of the accused activity is New Jersey. Accordingly, the fifth *Jones* factor weighs in favor of transfer.[74]

D. The Interests of Justice Compel Transfer of this Case

Uptown Dog is very small business, with Texas being the center of gravity of this case and much of the day-to-day business. Seattle, on the other hand, has no relation to this case other than the possibility (shared by many geographic areas in the U.S.) that people here can access Uptown Dog's web site.

Most importantly, Uptown Dog would be greatly burdened by litigating this case in Washington. Seattle is over 2,000 miles from Frisco, Texas, which is the sole place of

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[71] Woody Decl. at ¶14.

[72] *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir 1986).

[73] *Jones*, 211 F.3d at 498-99.

[74] *Sorensen*, 2003 WL 1888866 at *4.

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business for the small Uptown Dog company. All of Uptown Dog's personnel, documents, inventory, and facilities are located in Frisco, Texas.[75]

Thus, interests of justice favor litigation of this case in Texas.

VII. THE COURT SHOULD ORDER HIGH MAINTENANCE BITCH TO PROVIDE A MORE DEFINITE STATEMENT REGARDING WHICH PRODUCTS ARE ACCUSED OF INFRINGEMENT

If the Court finds that personal jurisdiction exists, the Court should order High Maintenance Bitch to furnish a more definite statement of its claim of patent infringement. As filed the Complaint is void of not only facts regarding personal jurisdiction, it fails to mention what products are accused of infringement. High Maintenance Bitch must have identified some product of infringement and compared it to the asserted patent claims or it would be subject to Rule 11 violations for lack of an adequate prefiling investigation.[76] An adequate prefiling investigation would include at least the following: (1) comparing the two designs from the viewpoint of the ordinary observer to determine whether the patented design as a whole is substantially the same as the accused design; and (2) determining the "point of novelty" of the patents to make sure the accused device appropriates the novelty in the patented device which distinguishes it from the prior art.[77]

The Court should order High Maintenance Bitch to specify its patent infringement allegations in the following respects:

1. Identify the products that are accused of infringement; and

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[75] Woody Decl. at ¶14.

[76] *See*, *Judin v. U.S.*, 110 F.3d 780, 784 (Fed. Cir. 1997) (district court abused its discretion for not granting Rule 11 sanctions against a patentee for failure to obtain a sample of the accused product as part of its prefiling investigation); *see also*, *Eon-Net, L.P. v. Flagstar Bancorp, Inc.* (C05-2129MJP) DKT.79 (W.D. Washington 2006) (*citing*, *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000). However, it is doubtful that the High Maintenance Bitch actually compared the product because Uptown Dog does not have any record of selling any product to High Maintenance Bitch. Woody Decl. at ¶20.

[77] *See*, *Lawman Armor Corp. v. Winner International LLC*, 437 F.3d 1383 (Fed.Cir. 2006) (to determine infringement of a design patent, a court must apply two distinct tests: (a) the ordinary observer test; and (b) the "point of novelty test").

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2. Identify the points of novelty of the three patents that are present on the accused products.

These simple facts will further the efficient, economical disposition of this action, because the parties will be able to identify which products are actually accused of infringement and the potential damages at issue. It could also result in a complete dismissal of this action based upon invalidity and/or non-infringement.

VIII. CONCLUSION

Because High Maintenance Bitch cannot meet its burden in proving that Uptown Dog is subject to the jurisdiction of this Court, this Court must dismiss this action and award Uptown Dog its reasonable attorney fees. Alternatively, if the Court finds that personal jurisdiction exists, the Court should transfer this matter to the Northern District of Texas and order High Maintenance Bitch to provide a more definite statement.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2007, the foregoing Defendant's Motion And Memorandum To Dismiss For Lack Of Personal Jurisdiction Pursuant To Civil Rule 12(B)(2) And Improper Venue, Or Alternatively To Transfer And For Plaintiff To Provide A More Definite Statement was filed with the Court using the CM/ECF system which will send notification of such filing to the following:

- Daniel M Bronski
  Veri Trademark
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Executed on July 24, 2007.

/s/ Steven P. Fricke

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